

# **EXHIBIT 2**

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 MASIMO CORPORATION,

4 Plaintiff,

5 v

6 PHILIPS ELECTRONICS NORTH AMERICA  
CORPORATION and PHILIPS MEDIZIN  
7 SYSTEME BOBLINGEN GMBH,

8 Defendants.

9 AND RELATED COUNTERCLAIMS.  
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: CIVIL ACTION

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10 Wilmington, Delaware  
11 Thursday, February 12, 2015  
12 *Bench Trial - Volume B*

13 BEFORE: HONORABLE **LEONARD P. STARK**, Chief Judge

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15 APPEARANCES:

16  
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19 and

20 KNOBBE, MARTENS, OLSON & BEAR, LLP  
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25 and

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Official Court Reporter

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Kesler - cross

1 prosecution or litigation, and so she was the right fit. We  
2 would ask -- any one of us on the prosecution team for any  
3 of the reexams, we would go ask her to go pull documents  
4 from the litigators. She would go do that, prepare the  
5 IDS's, and we would file them in any case where any of those  
6 documents were even remotely relevant.

7 Q. So if I understand your testimony, who prompted a  
8 request for documents in this process that was set up?

9 A. The prosecutors.

10 Q. And how would you decide when to issue a prompt for  
11 litigation documents?

12 A. So any time we were preparing a response to an  
13 Office Action or any other action that was coming up in a  
14 reexamination or any case at all, we would ask Kendall to go  
15 find those. And that was true for any of us, so if any of  
16 us asked, or she would go prepare it for all of them.

17 I would also, when I ran into litigators in  
18 the hallway, for example, I would generally ask, how is the  
19 litigation going? And if they sounded like there were some  
20 documents that needed to be pulled, I would go make sure  
21 that Kendall -- I would go ask Kendall, hey, it sounds like  
22 there is something going on in litigation. Why don't you go  
23 out and find if there are any documents we need to submit.

24 Q. So would you ever be the one to ask, for example,  
25 Steve Jensen: Hey, Steve. Do you have any documents to

Kesler - cross

1 give me?

2 A. No, absolutely not. He is such a busy guy, and I  
3 have such a hard time catching him that that is just not a  
4 good process. That is why we have Kendall to go ask the  
5 lower level litigators what is going on? Pull the  
6 documents, bring them to us.

7 Q. I have to ask you in that regard, Mr. Kesler,  
8 yesterday you talked about a five point plan referring to  
9 Mr. Jensen. What were you referring to?

10 A. Okay. So I initially start by trying to call his  
11 office or walk down to it.

12 If he is not there, I ask his assistant to let  
13 me know where he is and let me know when he comes into the  
14 office.

15 If it doesn't sound like he is going to be in  
16 any time soon, then I'll send him an e-mail, I'll give him a  
17 call on his phone, I'll call him on his cellphone, I'll  
18 leave a message on both of those.

19 And then I will text him if I really need to get  
20 ahold of him.

21 Q. And how long would it typically take for litigation  
22 documents to be submitted once with the litigation document  
23 is created or issued, entered? How long would it typically  
24 take for these litigation documents to be submitted to the  
25 Patent Office?

Jensen - cross

1 possible to do so.

2 Q. Mr. Jensen, you're the client confidant. You are Mr.  
3 Kiani's contact. As he described, you are brothers from  
4 different mothers. You advised Masimo on all important  
5 strategic decisions in this litigation where your client is  
6 seeking hundreds of millions of dollars on two patents, one  
7 of which is the '984 patent. You learned that the sole  
8 argument advanced through the PTO for patentability had been  
9 rejected. You had been stung before for failing to disclose  
10 litigation to the PTO, yet Judge Stark's March 31st Order  
11 comes in and it stops you with you in that conversation with  
12 Mr. Grover and Mr. Kesler so that the Order never gets to  
13 the PTO. And your explanation, Mr. Jensen, is that it was  
14 not your job?

15 A. No.

16 MR. ROOKLIDGE: No further questions.

17 THE COURT: Okay. Round two.

18 CROSS-EXAMINATION

19 BY MS. WEIL:

20 Q. Good afternoon, Mr. Jensen.

21 A. Good afternoon, Ms. Weil.

22 Q. Can you explain why you said no to that last  
23 question?

24 A. Well, there was a lot of things built into it that I  
25 found objectionable. And so in saying "no" to that, the

Jensen - cross

1 that you were the only lawyer with complete knowledge of all  
2 the enforcement efforts of Masimo's patents?

3 A. With knowledge, yeah. What time period?

4 Q. 2013-2014.

5 A. 2013, no. That's what I said in my prior testimony.  
6 This was 2010. Very, very, very different time periods in  
7 terms of what I was doing.

8 Q. You can put that away.

9 All right. I want to talk about the '984  
10 reexam. Actually, the reexams in general. So you know that  
11 there were 23 reexams filed against Masimo's patents?

12 A. I was informed, again, at a very high level, I think  
13 it was about three years into the case, that there had been  
14 23, a couple dozen reexams filed. Many of those by Philips.  
15 Some by, many additional ones by Masimo's competitor  
16 Nellcor. And by some who we don't know.

17 Q. Do you supervise any of those reexams?

18 A. I don't supervise them at all, no.

19 Q. Do you oversee or coordinate any of them?

20 A. No. That doesn't even come with my coordination, as  
21 the chart shows, that is not even one that I coordinate.  
22 That I leave to the prosecution team, to coordinate and  
23 figure out how to staff those and trust that they will do  
24 it.

25 Q. Do you control any of them in any way?

Jensen - cross

1 A. No, I do not control them.

2 Q. Do you have day-to-day or even regular knowledge of  
3 the details of what has been going on in those reexams?

4 A. No. It's actually pretty rare that I get even a  
5 general update on that. I trust the team.

6 Q. So we have already heard some testimony from you  
7 regarding the procedures that you instigated for the  
8 disclosure of litigation documents to the Patent and  
9 Trademark Office in connection with the reexams and other  
10 pending patent prosecution. I want to turn to that a little  
11 bit.

12 Could you tell us what impact, if any, the  
13 determination in the Nellcor case that you had committed  
14 inequitable conduct had on that procedure?

15 A. It had an enormous effect. That was a very upsetting  
16 time for me, a very stressful period. I think, as Mr. Re  
17 said in opening, it gets somebody's attention. It's a  
18 patent lawyer's worst nightmare. I think it was for me. It  
19 was very, very upsetting for me.

20 And so it really caused an entire shift, not  
21 only in my practice, in the way that I interacted with  
22 Masimo and the way my practice was formulated, I think it  
23 actually made changes throughout the firm.

24 I almost quit the practice of law at that point  
25 in time. But it made very, very, very significant changes



Jensen - cross

1 in the way my practice was formed and what I was going to do  
2 going forward to make sure it never happened again.

3 Q. And was that one of the reasons for this procedure  
4 that you instigated for the reexams with the go-between of  
5 Ms. Loebakka that we've heard testimony about?

6 A. It was clearly the primary reason that I asked that.  
7 I mean these documents that are coming in in the litigation,  
8 the prosecutors wouldn't even know about them on a normal  
9 basis. And I wanted to make sure that everything just got  
10 sent in because, otherwise, somebody would forget something.  
11 It was document by document, relying on someone to just  
12 remember: Oh, I need to send this over to the prosecutors.  
13 I knew from experience there is no way that would work. And  
14 so I wanted to have a process in place.

15 There were two teams. They didn't really know  
16 what was going on on a day-to-day basis. They didn't have  
17 the details. They were separated. There was actually a  
18 Protective Order in this case by Philips' design that made  
19 it so they weren't connected. You couldn't have the  
20 prosecution team rummaging through litigation materials and  
21 happen across something that was under the Protective Order.

22 So we had to come up with something where  
23 they would somehow go to the litigation teams, and there  
24 were multiple of them, and there are hundreds of patent  
25 applications, and they would know what was going on in those

Jensen - cross

1 patent applications rather than some litigator having to keep  
2 track, which would have been impossible, and trigger them  
3 providing materials from, get the litigation teams to provide  
4 them materials that related to any patent that was involved in  
5 litigation. They could communicate that easier. Let's find  
6 out what was going on in the prosecution, get that information  
7 and send it in, just send it all in to the Patent Office. And  
8 that's the prior finding, was the single most significant  
9 reason in asking that that be done.

10 Q. I bet you have never want that again.

11 A. I never want that again.

12 Q. And how did that Court determination affect the kind  
13 of work that you did for Masimo going forward?

14 A. It took me out of the prosecution, out of -- if  
15 you remember that case, I was actually supervising the  
16 prosecution at the time, and not necessarily doing all of it  
17 but that's the way I was supervising it. And I was actually  
18 litigating the case as one of the lead lawyers in the case.

19 That completely changed and stopped and  
20 separated from that point forward. And I stepped out of  
21 supervising, directing, controlling, doing, providing the  
22 oversight or even coordinating the prosecution from that  
23 point forward.

24 And like I said, I'd get consulted. I went on  
25 an interview. That is something I get pulled into and it's

Jensen - cross

1 a quick in and out. But I stepped out of it.

2 Q. And just a few things that I want to zero in on with  
3 respect to this process for the disclosure. At any time  
4 during the reexam of the '984 patent, have you been part of  
5 the review or decision process of what to submit to the PTO?

6 A. No, I am not part of that process. The process  
7 happens without any of my involvement.

8 Q. And at any time during the '984 reexam, have you been  
9 part of the process of getting litigation materials to the  
10 prosecution teams?

11 A. No, the group that was set up there did not involve,  
12 did not include me. It excluded me.

13 Q. All right. Now, I would like to talk about the  
14 interview in the reexam.

15 A. Okay.

16 Q. I believe that you testified earlier that that  
17 interview involved both the '222 and the '984; is that  
18 right?

19 A. Correct.

20 Q. What was the status of the '222 patent at the time of  
21 the interview?

22 A. It was an expired patent. It was actually very  
23 important, but it was expired, as was the '984.

24 Q. The '984 was expired as well?

25 A. The '984 was expired as well.